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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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8 CARLOS ARMANDO SALDANA, No. C-12-6026 TEH (PR)
9 Petitioner,
10 v. ORDER TO DISMISSAL
11 RANDY GROUNDS, Warden,
12 Respondent.
13 _____/

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15 Petitioner, a state prisoner incarcerated at California
16 Training Facility in Soledad, California, has filed a pro se
17 Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254
18 challenging a judgment of conviction from Contra Costa County
19 Superior Court. Doc. #1. He has paid the \$5.00 filing fee.

20 I

21 In 2009, Petitioner was convicted by jury in Contra Costa
22 County Superior Court of forcible rape and other sexual crimes. In
23 2010, the California Court of Appeal affirmed the judgment and the
24 California Supreme Court denied review. The instant federal
25 petition for a writ of habeas corpus followed. Doc. #1.

26 II

27 This Court may entertain a petition for a writ of habeas
28 corpus "in behalf of a person in custody pursuant to the judgment of

1 a State court only on the ground that he is in custody in violation
2 of the Constitution or laws or treaties of the United States." 28
3 U.S.C. § 2254(a). It shall "award the writ or issue an order
4 directing the respondent to show cause why the writ should not be
5 granted, unless it appears from the application that the applicant
6 or person detained is not entitled thereto." Id. § 2243.

7 Petitioner seeks federal habeas corpus relief on two
8 claims: (1) ineffective assistance of appellate counsel and
9 (2) ineffective assistance of trial counsel. Doc. #1 at 6.
10 However, Petitioner indicates that his state habeas petition for a
11 writ of habeas corpus, in which he first asserts his claim of
12 ineffective assistance of appellate counsel, is still pending in the
13 Contra Costa Superior Court. Doc. #1 at 3, 4.

14 Prisoners in state custody who wish to challenge
15 collaterally in federal habeas proceedings either the fact or length
16 of their confinement are first required to exhaust state judicial
17 remedies, either on direct appeal or through collateral proceedings,
18 by presenting the highest state court available with a fair
19 opportunity to rule on the merits of each and every claim they seek
20 to raise in federal court. See 28 U.S.C. § 2254(b), (c); Rose v.
21 Lundy, 455 U.S. 509, 515-16 (1982); Duckworth v. Serrano, 454 U.S.
22 1, 3 (1981). The appropriate time to assess whether a prisoner has
23 exhausted his state remedies is when the federal habeas petition is
24 filed. Brown v. Maass, 11 F3d 914, 915 (9th Cir. 1993).

25 The exhaustion requirement is not satisfied if there is a
26 pending post-conviction proceeding in state court, even if the issue
27 the petitioner seeks to raise in federal court has been finally
28

1 determined by the highest available state court in another context.
2 Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983). This is
3 because the pending state action might result in reversal of the
4 conviction on some other ground mootng the federal case. Id.; see
5 also Schnepp v. State of Oregon, 333 F.2d 288, 288 (9th Cir. 1964)
6 (affirming dismissal of petition because there were post-conviction
7 proceedings pending in state court); Alls v. Curry, 2008 WL 4183430,
8 *1-2 (N.D. Cal.) (dismissing petition without prejudice due to
9 pending state habeas petition).

10 Therefore, this petition must be dismissed without
11 prejudice to refiling when no further proceedings are pending in the
12 California state courts.

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14 IT IS SO ORDERED.

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16 DATED 12/10/2012



THELTON E. HENDERSON
United States District Judge